



Department of
Justice

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Consultation on proposal to extend the power of the Criminal Cases Review Commission to obtain documents from private organisations and individuals

Comments are invited and should be made to the following
address by 27 February 2014

Criminal Justice Policy and Legislation Division
Massey House
Stormont Estate
Belfast
BT4 3SX

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1. Introduction

- 1.1 The Department of Justice is consulting on a proposal to extend the power of the Criminal Cases Review Commission to obtain documents and other material from private organisations and individuals.
- 1.2 We would consider that such a change would benefit applicants who believe they have suffered a miscarriage of justice however the proposal will also impact on private business and individuals.
- 1.3 An equality screening exercise indicates that the change would only impact on a small number of cases; the Commission would always first seek to obtain the information voluntarily; application for an order would be required to be made to the Crown Court, and the Court Rules Committee would ensure an open and fair process is in place for this.
- 1.4 Your views on this are welcome. This consultation will provide the opportunity to inform our decision on whether to extend this legislative change to Northern Ireland.

2. The Criminal Cases Review Commission

- 2.1 The [Criminal Cases Review Commission](#) (the Commission) was established as an independent body under the [Criminal Appeal Act 1995](#) (the 1995 Act) to investigate potential miscarriages of justice in England, Wales and Northern Ireland and refer appropriate cases to the Court of Appeal.
- 2.2 The Commission are independent and impartial and do not represent the prosecution or the defence. They aim to enhance public confidence in the criminal justice system, to give hope and bring justice to those wrongly conviction and based on their experience to contribute to reform and improvements in the law.
- 2.3 Anyone who believes that they have been wrongly convicted of a criminal offence in Northern Ireland can ask the Commission to review their case. The Commission can look at a conviction, or a sentence or both.
- 2.4 When an application is made to the Commission they begin by gathering all the relevant papers that will assist them in the investigation of a case. This will include files from the court regarding the conviction and papers from the first appeal hearing.
- 2.5 In the last five years from April 2009 to March 2014 the Commission has received 189 applications from Northern Ireland and referred 9 cases to the Court of Appeal.
- 2.6 The Commission is also responsible for recommending the use of the Royal Prerogative of Mercy.

3. Section 17 powers

3.1 The 1995 Act provides the Commission with the power to obtain documents or material from public bodies which may assist the investigation. Section 17(4) provides that this duty is not affected by any obligation of secrecy, or other limitation on disclosure. This means that the Commission may access material of the upmost sensitivity and of the highest security levels.

3.2 However the Commission has no power to obtain material from the private sector and the Commission has advised that this has often worked to the disadvantage of applicants. The problem has become more acute in recent years because;

- ◆ Much of the responsibility for material once held by public bodies is now entrusted to private sector bodies.
- ◆ The number of private sector bodies holding information relevant to cases under review by the Commission has increased
- ◆ Recent statutory data protection trends have reinforced the issue of confidentiality and have affected the voluntary co-operation of private bodies.

3.3 The Commission encounters four typical situations which, as a result of its lack of powers in relation to the private sector, operate to the applicant's disadvantage:-

- ◆ Inability to obtain information from a private individual;
- ◆ Inability to obtain information from a private sector organisation;
- ◆ Partial information is provided which the Commission is not in a position to scrutinise or verify; and
- ◆ The information sought is obtained but protracted negotiations within the private sector create lengthy and expensive delays as the material is negotiated.

4. Casework examples

4.1 The difficulties are best illustrated by some examples from cases which have been reviewed by the Commission. The examples provided indicate that the new provision would include such bodies as private schools, clinics, the banking sector, shops and stores, employers and GP's as well as private individuals. As can be seen from these examples, at best it can be an extremely costly and time consuming exercise; and at worst it can mean that a point of investigation remains unresolved and, as a result, a potential miscarriage of justice missed.

4.2 News agencies

Shortly after trial, a newspaper published an interview with a complainant in a rape case. It was important for the Commission to establish whether she entered into negotiations to sell her story prior to giving her evidence. It could be argued that the defence was unfairly deprived of an opportunity to cross-examine regarding her motives for making the allegations. In a case where the conviction rested solely on the complainant's testimony and credibility, this was particularly important. Despite repeated communications with the relevant journalist and the legal department of the newspaper no response was received and the issue could not be resolved.

4.3 Private clinics

In a Commission review, files held by social services, schools and the NHS were obtained and examined by the Commission under the provisions of section 17. The complainant had been referred to a private sector counselling clinic. Despite lengthy correspondence, access to these private counselling records was denied. The significance of this information in relation to the complainant's credibility and the safety of the applicant's conviction remains unknown.

4.4 Employee details

In a murder conviction, the Commission contacted a high street bank to seek the employment details of a former employee, a witness at trial, as this information was directly relevant to the credibility of her testimony at trial. After a long correspondence, the police liaison officer for the bank agreed to provide the information requested, although there was no obligation to do so. The decision to co-operate with the Commission, however, was expressed to be only because the employee had left her employment with the bank.

4.5 Private schools

The applicant was convicted of indecently assaulting three former pupils during his employment as a housemaster at a private residential school used to accommodate boys with behavioural and emotional difficulties in local authority care. He was sentenced to three years' imprisonment. The only issue for the jury at trial was the credibility of the complainants. The Commission requested the files on each of the three complainants in order to address issues raised about their credibility. The school declined the request, and the point remains unresolved.

4.6 Charitable organisations

A charitable organisation responsible for the administration of a residential school agreed to provide the complainant pupil's file to the Commission, although it was not obliged to do so. The information in the files showed that the complainant had made demonstrably false allegations of sexual abuse against other men during the same period of time she alleged abuse by the two convicted men. At that time, and subsequently, she made no mention of the two convicted men to the police, and described her stay at the school in glowing terms. There was further material available to show that the complainant was prone to exaggeration. This information led directly to two referrals to the Court of Appeal, and the convictions have been quashed. Had the

organisation not co-operated, the review may have taken substantially longer with the possibility of an unsuccessful outcome for the applicant.

Bodies such as the Samaritans, Childline and the National Society for the Prevention of Cruelty to Children often hold vital information relevant to Commission reviews, particularly in cases of intra-family sexual abuse. Such organisations may agree to assist when the consent of the individual concerned is obtained. If consent is not forthcoming such organisations will generally decline to provide the Commission with information on the basis of confidentiality.

4.7 Information held by experts

Many of the experts who appear as witnesses at trial keep personal notes in addition to their professional notes and reports. Forensic Medical Examiners may receive information or notes from victims of crime during the course of their examinations. Short reports and second-hand accounts within NHS files are generally provided to the Commission as a result of section 17; the original contemporaneous notes of interview recorded by the clinicians are not. This type of information is private rather than public.

4.8 Shops and stores

The applicant, convicted of a serious armed robbery, alleged that the expert “facial mapping” evidence adduced at trial was flawed. The Commission wished to instruct an expert to conduct further tests. The owner refused to provide information about the make and specifications of the CCTV equipment, which the new expert required in order to consider and report on the issue.

4.9 The Banking Sector

In respect of a serious fraud conviction, considerations of customer confidentiality were cited in response to the Commission’s requests for information in the banking sector, despite reassurances as to how the

information would be handled and disclosed. The assertions made by the applicant could not be proved or disproved.

4.10 Private individuals

The overwhelming majority of private individuals approached by the Commission have agreed to be interviewed however some simply refuse to assist the Commission. The reasons for such refusal are manifold. Some individuals do not wish to be bothered and are indifferent concerning the outcome of the Commission's investigations. Some may be hostile to the Commission and some may be reluctant to be seen to talk to the Commission for fear of reprisals.

5. Equality considerations

- 5.1 As a public authority under Section 75 of the Northern Ireland Act 1998, the DOJ is required to have due regard to the need to promote equality of opportunity. This legislation also requires public authorities to identify whether a policy has a differential impact upon relevant groups; the nature and extent of that impact; and whether such impact is justifiable. These obligations are designed to ensure that equality and good relations considerations are made central to government policy development.
- 5.2 We believe that the introduction of these arrangements will be beneficial and will have no adverse effect in Section 75 terms. Currently the Commission's inquiry into a miscarriage of justice can be impeded by the refusal of a private organisation to provide information. The absence of any compulsion to do so may result in the victim of a miscarriage of justice suffering continued imprisonment and the continuing social consequences of having a criminal conviction. In terms of human rights the extension of the Commission's powers will promote a person's right to a fair trial.
- 5.3 In terms of the impact on the civil liberties of private organisations and individuals, any extension to the power of the Commission would include safeguards to ensure that the Commission would always first attempt to obtain any information voluntarily and should they still require the production of documents or material a request would be made under the judicial oversight of the Crown Court.
- 5.4 Appropriate safeguards around the transparency of the court order process and the right to legal representation would also be included in the measure.

- 5.5 It is worthwhile considering the situation of the Scottish Criminal Cases Review Commission which already has power to obtain information from the private sector. The relevant legislation provides that the Scottish Commission may make an application to the High Court for the production of material in the possession of 'a person or a public body'. In practice, when the Scottish Commission notifies a private sector body or individual that it wishes to inspect relevant material, a reminder of the statutory power to make an application to a court is usually sufficient to secure voluntary compliance. The Scottish Commission advise that very few cases have resulted in the need to make a formal application to court.
- 5.6 We do not therefore consider that an Equality Impact Assessment (EQIA) is required. Our screening form is available on the DOJ website. Comments on our screening assessment and equality conclusions are welcome.

6. Responses

- 6.1 The closing date for responses is 27 February 2014. We welcome responses in whatever format respondents find most suitable. Comments are invited to be made to the following address:-

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Text phone ☎ 028 9052 7668

Email: susan.nicholson@dojni.x.gsi.gov.uk

- 6.2 If you have any concerns about the way this consultation process has been handled, you may raise this with the Department's Consultation Co-ordinator at the following address:

Peter Grant
Equality Branch
Central Management Unit
Department of Justice
Castle Buildings
Stormont Estate
Belfast, BT4 3GS

Telephone ☎ 028 9052 8138

Text phone ☎ 028 9052 7668

Email: peter.grant@dojni.x.gsi.gov.uk

- 6.3 An electronic version of this consultation document is available to download from the Department's website. Hard copies and copies in other formats may be made available on request.
- 6.4 Responses to this consultation will be shared with the Justice Committee. The Department also intends to publish responses to the consultation (with contact details of private individuals removed prior to publication) and a summary of responses online following completion of the consultation process. Please let us know if you do not wish your response to be published. In any event you should be made aware that the Department's obligation under the Freedom of Information Act may require that any responses not subject to specific exemption would be disclosed to other parties on request.